

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CSX CORPORATION,

Plaintiff,

v.

THE CHILDREN'S INVESTMENT FUND  
MANAGEMENT (UK) LLP, THE CHILDREN'S  
INVESTMENT FUND MANAGEMENT  
(CAYMAN) LTD., THE CHILDREN'S  
INVESTMENT MASTER FUND, 3G CAPITAL  
PARTNERS LTD., 3G CAPITAL PARTNERS,  
L.P., 3G FUND, L.P., CHRISTOPHER HOHN,  
SNEHAL AMIN AND ALEXANDRE  
BEHRING, A/K/A ALEXANDRE BEHRING  
COSTA,

Defendants.

THE CHILDREN'S INVESTMENT MASTER  
FUND,

Counterclaim and Third-Party Plaintiff,

v.

CSX CORPORATION AND MICHAEL WARD,

Counterclaim and Third-Party Defendants.

3G CAPITAL PARTNERS LTD., 3G CAPITAL  
PARTNERS, L.P. AND 3G FUND, L.P.

Counterclaim and Third-Party Plaintiffs,

v.

CSX CORPORATION AND MICHAEL WARD,

Counterclaim and Third-Party Defendants.

ECF Case

08 Civ. 02764 (LAK) (KNF)

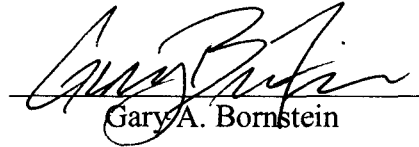
**DECLARATION OF GARY A.  
BORNSTEIN IN SUPPORT OF CSX'S  
OPPOSITION TO DEFENDANT'S  
MOTION *IN LIMINE* TO STRIKE  
PORTIONS OF THE WITNESS  
STATEMENT OF ALAN MILLER**

I, Gary A. Bornstein, an attorney duly admitted to practice before this Court, hereby declare the following to be true under penalties of perjury:

1. I am a member of the firm of Cravath, Swaine & Moore LLP, attorneys for Plaintiff CSX Corporation, and I am familiar with the facts and circumstances set forth herein. I respectfully submit this declaration in support of CSX's Opposition to Defendants' Motion *in Limine* to Strike Portions of the Witness Statement of Alan Miller.

2. Attached hereto as Exhibit 1 is a true and correct copy of excerpts of the deposition transcript of Alan Miller, dated May 5, 2008.

Dated: May 20, 2008  
New York, New York

  
Gary A. Bornstein

# **EXHIBIT 1**

5/5/2008 Miller, Alan

5/5/2008 Miller, Alan

1  
2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK  
4  
5 -----x  
6 CSX CORPORATION,  
7 Plaintiff, :  
8 vs. :  
9 THE CHILDREN'S INVESTMENT FUND:  
10 MANAGEMENT (UK) LLP, THE  
11 CHILDREN'S INVESTMENT FUND :  
12 MANAGEMENT (CAYMAN) LTD., THE  
13 CHILDREN'S INVESTMENT MASTER : Case No.  
14 FUND, 3G CAPITAL PARTNERS  
15 LTD., 3G CAPITAL PARTNERS, : 08 CV 02764  
16 L.P.; 3G FUND, L.P.;  
17 CHRISTOPHER HOHN; SNEHAL AMIN;:  
18 and ALEXANDRE BEHRING, a/k/a  
19 ALEXANDRE BEHRING COSTA, :  
20 Defendants.  
21 -----x  
22  
23 May 5, 2008  
24 10:13 a.m.  
25  
26 HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY  
27 Videotaped 30(b)(6) Deposition of ALAN  
28 MILLER, held at the offices of Day Pitney LLP, 7  
29 Times Square, New York, New York, before Frank  
30 J. Bas, a Registered Professional Reporter and  
31 Notary Public of the State of New York.  
32  
33  
34  
35

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
2 May 5, 2008  
3 New York, New York  
4 ---  
5 THE VIDEO OPERATOR: Good morning.  
6 This is the video operator speaking,  
7 Heather Zamora-Hegg of Merrill Legal  
8 Solutions, 25 West 45th Street, New York,  
9 New York.  
10 Today is May 5, 2008, and the time  
11 is 10:13 a.m. We are at the offices of Day  
12 Pitney, 7 Times Square, New York, New York,  
13 to take the videotaped deposition of Alan  
14 Miller in the matter of CSX Corporation  
15 versus The Children's Investment Fund  
16 Management (UK) LLP, et al., in the United  
17 States District Court for the Southern  
18 District of New York.  
19 Will counsel please introduce  
20 themselves for the record.  
21 MS. SERRANZANA: I'm Pamela  
22 Serranzana from Schulte Roth & Zabel. I'm  
23 here on behalf of TCI, Christopher Hohn,  
24 and Snehal Amin.  
25 MS. MELNICK: I'm Katie Melnick,

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5/5/2008 Miller, Alan

5/5/2008 Miller, Alan

1  
2 A P P E A R A N C E S:  
3 CRAVATH, SWAINE & MOORE LLP  
4 Attorneys for Plaintiff  
5 Worldwide Plaza  
6 825 Eighth Avenue  
7 New York, New York 10019  
8 BY: LILLIAN S. GROSSBARD, ESQ.  
9  
10 SCHULTE ROTH & ZABEL LLP  
11 Attorneys for TCI, Christopher Hohn, and Snehal  
12 Amin  
13 919 Third Avenue  
14 New York, New York 10022  
15  
16 BY: PAMELA C. SERRANZANA, ESQ.  
17 KATIE R. MELNICK, ESQ.  
18 ASSUNTA VIVOLO, ESQ.  
19  
20 KIRKLAND & ELLIS LLP  
21 Attorneys for 3G Capital Partners, Ltd.; 3G  
22 Capital Partners, L.P.; 3G Fund, L.P.; Alexandre  
23 Behring, a/k/a Alexandre Behring Costa  
24 153 East 53rd Street  
25 New York, New York 10011  
26  
27 BY: BRIAN W. SONG, ESQ.  
28  
29 DAY PITNEY LLP  
30 Attorneys for Innisfree, Inc., and the Witness  
31 7 Times Square  
32 New York, New York 10036  
33  
34 BY: M. ALEXANDER BOWIE, II, ESQ.  
35 AMY J. IANNONE, ESQ.  
36  
37 ALSO PRESENT:  
38  
39 HEATHER ZAMORA-HEGG, The Video Operator  
40  
41

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
2 from Schulte Roth & Zabel. And I'm also  
3 here on behalf of TCI, Christopher Hohn,  
4 and Snehal Amin.  
5 MS. VIVOLO: Assunta Vivolo from  
6 Schulte Roth & Zabel, on behalf of TCI,  
7 Christopher Hohn, and Snehal Amin.  
8 MR. SONG: I'm Brian Song from  
9 Kirkland & Ellis, on behalf of 3G and  
10 Alexandre Behring.  
11 MS. IANNONE: Amy Iannone from Day  
12 Pitney, on behalf of Innisfree M&A  
13 Incorporated.  
14 MS. GROSSBARD: Lillian Grossbard  
15 from Cravath Swaine & Moore LLP, on behalf  
16 of CSX Corporation.  
17 MR. BOWIE: Alex Bowie from Day  
18 Pitney, on behalf of Innisfree M&A  
19 Incorporated and the witness.  
20 THE VIDEO OPERATOR: The court  
21 reporter today is Frank Bas of Merrill  
22 Legal Solutions.  
23 Will the court reporter please swear  
24 the witness.  
25

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4

5/5/2008 Miller, Alan

5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 40-some-odd professionals. So theoretically  
 3 everyone reports to me.  
 4 Q. Okay.  
 5 A. Although it's not a dictatorship.  
 6 We like to think it's a collegial arrangement.  
 7 I'll qualify that. My -- my  
 8 co-chairman, my other -- Art Crozier, he doesn't  
 9 report to me any more than I report to him. Nor  
 10 do Jennifer and Meredith report to me. I mean,  
 11 we're -- we all work together.  
 12 Q. I'm sure they'll be happy to hear  
 13 that.  
 14 Can you tell me about your  
 15 day-to-day responsibilities at Innisfree?  
 16 A. Certainly. I manage account  
 17 relationships with clients in connection with  
 18 proxy solicitation, tender offers, and, you  
 19 know, shareholder meetings. That falls under  
 20 the rubric of proxy. I also, you know, play a  
 21 role in managing the firm.  
 22 Q. Let's talk about Innisfree itself  
 23 for a few minutes. What type of work does  
 24 Innisfree do?  
 25 A. Innisfree is a proxy solicitation

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 and investor relations firm. We represent  
 3 issuers and shareholders in -- in M&A matters,  
 4 in more mundane solicitations of shareholders.  
 5 We do a lot of analytical work for clients.  
 6 We're retained routinely by companies to watch  
 7 out for hedge fund accumulations. And by hedge  
 8 funds, to evaluate their prospects vis-a-vis  
 9 corporations.  
 10 Q. Approximately how much of your work  
 11 do you think is related to this watching out for  
 12 hedge funds?  
 13 A. A significant portion at this point.  
 14 Q. Let's talk about the circumstances  
 15 of Innisfree's retention by CSX.  
 16 A. Sure.  
 17 Q. When did CSX and Innisfree first  
 18 discuss working together?  
 19 A. Early last year.  
 20 Q. Can you be a little more specific?  
 21 A. I believe it was January or  
 22 February.  
 23 Q. And do you recall who was involved  
 24 in those discussions or how it came about?  
 25 A. Yes. I believe I was contacted by

18

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 Mr. Stephenson of the Cravath firm.  
 3 Q. So he called you on the phone?  
 4 A. Yes.  
 5 Q. And said -- what was the substance  
 6 of that conversation?  
 7 A. I don't have the specific  
 8 recollection of the conversation other than it  
 9 would have involved his desire to add me to the  
 10 team representing CSX at that point.  
 11 Q. Did he elaborate at all about the  
 12 reasons that they wanted to hire you and add you  
 13 to the team?  
 14 A. They had been contacted by TCI at  
 15 that point, I believe.  
 16 Q. So as of that initial conversation  
 17 you knew that TCI was involved?  
 18 A. Yes. I believe I did.  
 19 Q. Who is on the team, Innisfree team  
 20 that does the work for CSX?  
 21 A. Well, I oversee it. My partner,  
 22 Jennifer Shotwell, my partner Meredith Cole.  
 23 Kim Masterson. Lloyd Lefcourt. Those are the  
 24 people that are principally -- Scott Winter.  
 25 Q. And what are his --

19

5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 A. Larry Miller.  
 3 Q. I'm sorry. And what are Mr. Miller,  
 4 Mr. Lefcourt, and Mr. Winter's positions at  
 5 CSX -- or, I'm sorry, Innisfree?  
 6 A. Again, Mr. Miller is a director and  
 7 an account rep.  
 8 Mr. Winter is also a director and an  
 9 account rep. Both of them are former attorneys.  
 10 I guess Mr. Winter's still, I guess, practicing.  
 11 Mr. Lefcourt does a lot of  
 12 analytical work. I've worked closely with him  
 13 for more than 20 years. He oversees our banking  
 14 institutional area. He works closely with  
 15 Mr. Lentini in analyzing shareholder bases and  
 16 movements within them.  
 17 Q. Let me just go back for a minute to  
 18 your call with Mr. Stephenson.  
 19 A. Right.  
 20 Q. Do you recall what he told you about  
 21 TCI's contacts with CSX?  
 22 A. I don't have a specific recollection  
 23 of that call.  
 24 Q. When did he first tell you about the  
 25 contacts -- were you told about the contacts

20

5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 hedge fund who have had success in pursuing  
 3 their agendas at public companies.  
 4 Q. But you've never singled them out as  
 5 a topic for discussion.  
 6 A. No. Not in that -- not from that  
 7 perspective.  
 8 Q. How often do you -- would you  
 9 estimate you give talks about hedge fund  
 10 activism?  
 11 A. It's fairly frequent. I did one  
 12 last week at Northwestern. I did one several  
 13 weeks before at the Tulane conference. You  
 14 know, certainly three or four times a year.  
 15 Q. Moving back to the -- I think you  
 16 called it the weekly -- what did you call it? I  
 17 called it the snapshot. What -- what did you  
 18 call it? The weekly shareholders --  
 19 A. I don't think I characterized it. I  
 20 think I was responding to your characterization  
 21 of --  
 22 Q. What would you call that document  
 23 that we were talking about?  
 24 A. I would call it a weekly -- a weekly  
 25 report that endeavors to track movement in the

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 shareholder base and to try to explain, you  
 3 know, the understanding of our analysts of  
 4 what's going on.  
 5 Q. Do you agree that we could call it  
 6 the weekly report for simplification purposes?  
 7 A. Sure.  
 8 Q. Okay. So when did you start putting  
 9 together these weekly reports for CSX?  
 10 A. I did not ever put them together, so  
 11 I don't recall the exact date. I think it was  
 12 sometime last spring when the type of reporting  
 13 was formalized in discussions between the  
 14 company and our -- our people.  
 15 Q. And do you remember who was involved  
 16 in those discussions?  
 17 A. It would have been Meredith Cole,  
 18 and likely Kim Masterson as well.  
 19 Q. And who did they speak with at CSX?  
 20 A. I don't recall.  
 21 Q. Do you recall why --  
 22 A. It might have been David Baggs.  
 23 He's the IR -- head of IR at CSX.  
 24 Q. Do you recall why you were asked to  
 25 put these together, what they -- for what

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 purpose they wanted them?  
 3 MS. GROSSBARD: Objection.  
 4 A. I wasn't asked, so I wouldn't have a  
 5 recollection of -- of any conversation about it  
 6 between us and CSX, so ...  
 7 Q. Were you told about any conversation  
 8 between Innisfree and CSX about these weekly  
 9 reports?  
 10 A. No. There was -- there was an  
 11 ongoing discussion. We had been reporting to  
 12 the company, you know, individually as, you  
 13 know, I certainly had conversations with certain  
 14 people at the company. Meredith and Kim had  
 15 conversations with other people at the company,  
 16 and it represented a formalization of the  
 17 discussions that Meredith and Kim were having  
 18 with the IR department, I believe.  
 19 Q. What do you call -- what do you mean  
 20 by "a formalization"?  
 21 A. In other words, there was a  
 22 particular form of reporting that was agreed  
 23 upon between the -- CSX's IR people and my IR  
 24 people.  
 25 Q. Who did you speak with at CSX about

35

5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 this?  
 3 A. I think I just testified that I did  
 4 not speak directly to CSX about this, that I  
 5 believe Meredith and Kim did.  
 6 Q. Okay. And you think they spoke with  
 7 David Baggs.  
 8 A. I believe that's correct.  
 9 Q. What's the purpose of these  
 10 documents?  
 11 A. The purpose of the weekly reports?  
 12 Q. The weekly reports.  
 13 A. The purpose of the weekly reports is  
 14 to provide the client information regarding the  
 15 movement in the shareholder base in a format  
 16 that they requested.  
 17 Q. So would it be fair to say that CSX  
 18 approved the format that you eventually ended up  
 19 with?  
 20 A. I believe that's fair to say.  
 21 Q. In your experience, why would a  
 22 client want to see the movement of -- of the  
 23 shareholder base in these reports?  
 24 A. Well, for one thing, as we do for  
 25 many, many companies, issuers are concerned with

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 the concentration of ownership into the hands of  
 3 investors who may have a different orientation  
 4 than their traditional long-term investors.  
 5 Q. Is it your understanding that this  
 6 was one of CSX's concerns?  
 7 A. Yes. I believe I testified that's  
 8 why we were retained in the first place.  
 9 Q. You stated that you don't put these  
 10 snapshots together.  
 11 A. I do not.  
 12 Q. You are the boss?  
 13 A. That's not an unfair  
 14 characterization.  
 15 Q. Who does put these snapshots  
 16 together?  
 17 A. Kim Masterson, under the direction  
 18 of Meredith Cole.  
 19 Q. And I know that I characterized it  
 20 as the weekly snapshot, but how often does it  
 21 actually go out?  
 22 A. I believe it goes out on -- on a  
 23 weekly basis.  
 24 Q. Okay. I know that you said that you  
 25 don't put these snapshots together, but do you

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 know the basic process for how these are  
 3 constructed, and -- and can you walk us through  
 4 that process?  
 5 A. Yes. I mean, the -- the analysis  
 6 involves a number of elements. The key element  
 7 is tracking movement within the participant  
 8 listings provided by the Depository Trust  
 9 Company for their nominee, Cede & Co. That's  
 10 C-E-D-E.  
 11 Since virtually all shares held by  
 12 institutions and hedge funds and a significant  
 13 portion of the retail base -- a very significant  
 14 portion of the overall shareholder base is held  
 15 within this one nominee account, we -- we  
 16 analyze a subset of that in these participant  
 17 listings, which will show us movement between  
 18 custodians that hold primarily for hedge funds,  
 19 custodians that hold primarily for institutions,  
 20 and custodians who hold primarily for retail  
 21 investors among one another.  
 22 So from that kind of top-down  
 23 approach we can very accurately, at any given  
 24 time, provide a -- a close estimate of the  
 25 shares held by retail investors as opposed to

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 the shares held by institutional investors,  
 3 again, as opposed to shares held by hedge funds.  
 4 And within that overall hedge fund  
 5 category there are direct holdings, as well as  
 6 shares held in swap arrangements.  
 7 Q. And do you --  
 8 A. We also incorporate the public  
 9 information that's available on Forms 13-F, G  
 10 and D, as filed with the SEC, and any  
 11 information that we or the client receives  
 12 directly in communication with shareholders.  
 13 And with all of these elements, we  
 14 try to put together as accurate a picture of the  
 15 shareholder base at any given time.  
 16 MR. BOWIE: Let me just -- I think  
 17 there's a protective order in this case, as  
 18 I understand it, and the third parties are  
 19 entitled to designate, and so we would  
 20 designate this confidential, this  
 21 transcript confidential. We're getting  
 22 into material that I think Innisfree would  
 23 want to potentially have categorized that  
 24 way.  
 25 It may be that we can pare that down

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 to less than all of it at some point, but  
 3 at this point I would like to just  
 4 designate the whole thing as confidential,  
 5 if I can.  
 6 MS. SERRANZANA: Okay. So we'll  
 7 designate it as confidential for now, and  
 8 we'll review it at a later date. Or you  
 9 will review it at a later date and decide  
 10 whether or not you want to continue with  
 11 that designation or only for certain  
 12 portions of the transcript.  
 13 MR. BOWIE: Right. If -- if you  
 14 would like me to pare it down, just let me  
 15 know and I will undertake to do that.  
 16 MS. SERRANZANA: Okay. That would  
 17 be great.  
 18 THE WITNESS: May I use the  
 19 bathroom?  
 20 MS. SERRANZANA: Sure. Take a  
 21 break.  
 22 THE VIDEO OPERATOR: We're going off  
 23 the record. The time is 11:06 a.m.  
 24 ---  
 25 (Recess.)

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 ---  
 3 THE VIDEO OPERATOR: Returning to  
 4 the record. The time is 11:14 a.m.  
 5 BY MS. SERRANZANA:  
 6 Q. Sir, you were walking us through the  
 7 process of putting together the -- the weekly  
 8 report.  
 9 A. Yes.  
 10 Q. You mentioned that the shares --  
 11 could you tell me what the DTC is?  
 12 A. The DTC is an acronym for the  
 13 Depository Trust Company, an abbreviation for  
 14 the Depository Trust Company, which is a central  
 15 certificate depository. It was established some  
 16 years ago in order to eliminate the paper crunch  
 17 on Wall Street by the member firms in the New  
 18 York Stock Exchange. Its participants now  
 19 include virtually all the banks and brokers that  
 20 are custodians or shareholders of public  
 21 companies.  
 22 Q. And as part of your analysis that  
 23 you enumerated before, did you -- am I correct  
 24 in -- in stating that you assigned the shares  
 25 within the DTC a category?

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 A. That's correct.  
 3 Q. And how do you make those --  
 4 A. From our experience, most  
 5 custodians, with several -- few exceptions, are  
 6 pretty much pure play in the type of investors  
 7 they hold shares for.  
 8 Most institutional shares are held  
 9 by custodial banks. Most retail shares are held  
 10 by certain brokerage firms that cater to the  
 11 retail trade, and most shares held by hedge  
 12 funds or in swap arrangements are held through  
 13 other brokerage firms that cater to them.  
 14 Q. And how do you know which custodians  
 15 perform which duties?  
 16 A. Well, in 30 years of experience  
 17 I've, you know, I've developed certain expertise  
 18 in identifying those.  
 19 Q. So this is based on your experience.  
 20 A. Based on my experience and the  
 21 experience of my colleagues over thousands of  
 22 solicitations.  
 23 Q. You mentioned the term "pure play"?  
 24 A. Yes.  
 25 Q. Could you explain what that is?

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 A. What -- what I was saying was that  
 3 most of these custodians' positions are  
 4 comprised of purely one type of investment.  
 5 With very few exceptions. The exceptions  
 6 include Merrill Lynch, which holds for both  
 7 retail investors and hedge funds. A little bit  
 8 of the old Smith Barney Shearson positions  
 9 through Citigroup also fits that category,  
 10 although that's a combination of retail, some  
 11 institutional, and some hedge positions.  
 12 All the others, for the most part,  
 13 are pretty pure play.  
 14 Q. And these pure-play institutions, is  
 15 there any trend toward them diversifying in any  
 16 way, or is that ...  
 17 A. I'm trying to understand your  
 18 question.  
 19 MS. SERRANZANA: Strike that.  
 20 BY MS. SERRANZANA:  
 21 Q. What do you do -- you mentioned that  
 22 Merrill Lynch is not one of the pure-play  
 23 institutions.  
 24 A. That's correct.  
 25 Q. What do you do with respect to the

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 category -- categorizing the non-pure-play  
 3 institutions such as Merrill Lynch?  
 4 A. You can approach it one of several  
 5 ways. There are formulaic ways of doing it, or,  
 6 you know, to be more precise, you can look at  
 7 a -- a baseline and monitor changes from that  
 8 baseline.  
 9 So if Merrill Lynch, for example,  
 10 held 5 million shares one day and 30 million  
 11 shares the next, in a situation like this you  
 12 might conclude, since retail investors are not  
 13 aggressive traders of shares, they tend to keep  
 14 and hold their positions, that the increase was  
 15 not of a retail nature.  
 16 Q. So it's based on your knowledge of  
 17 what -- in this example, what retail typically  
 18 does?  
 19 A. That's correct.  
 20 Q. Do you review the weekly reports  
 21 before they go out?  
 22 A. Sometimes. As time permits.  
 23 Q. And you make corrections to these  
 24 reports?  
 25 A. Occasionally.

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER

2 Q. How often do you review these, would  
3 you estimate? What percentage of the time?

4 A. Perhaps half the time. Maybe not  
5 quite that often.

6 Q. Does somebody from your office  
7 review them before they go out the door?

8 A. Well, if they're -- if Kim Masterson  
9 has primary responsibility for putting them  
10 together, Meredith Cole is the first line of  
11 review. I review them when I can.

12 Q. Do you ever review it at the request  
13 of someone in your office?

14 A. Occasionally Kim will come to me and  
15 say, you know, Can you take a look at this?

16 Q. Has she --

17 A. Do you agree with my  
18 characterization, for example.

19 Q. Has she ever done that with respect  
20 to the -- do you recall any specific snapshots  
21 that she's come to you and said -- I'm sorry --  
22 weekly reports that she has come to you and  
23 said, Could you take a look at this?

24 MR. BOWIE: On the CSX matter?

25 MS. SERRANZANA: On the CSX matter.

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER

2 A. Any specific ones?

3 Q. Or from specific times. Anything  
4 that you can remember.

5 A. No. They kind of -- I mean, this is  
6 an ongoing matter, and from time to time she'll  
7 come to me. As -- as to recalling a specific  
8 conversation about one or more reports, I don't  
9 have an immediate recollection of that.

10 Q. Has she ever come to you about  
11 specific topics that you recall, that she wanted  
12 some clarification about?

13 A. There have been discussions, sure.

14 Q. And what do you recall about those  
15 discussions?

16 A. There was recently some discussion  
17 as to shares that were held at Brown Brothers  
18 Harriman and how they ought to be characterized.

19 Q. And what else do you remember about  
20 that discussion? Why did she come to you?

21 A. Because she was trying to be as  
22 accurate as possible in her analysis, and  
23 appreciates my point of view.

24 Q. How had she previously characterized  
25 the Brown Brothers Harrison (phonetic) stock?

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER

2 A. I think, you know, typically shares  
3 held at Brown Brothers Harriman are held by  
4 foreign investors or through one of several US  
5 institutions, Fidelity being the most prominent,  
6 but they're not a significant holder of CSX.  
7 There are several other US institutions. But  
8 primarily it's a foreign institutional holding,  
9 although, you know, we don't have -- we don't  
10 have -- we can't see through the position.

11 So that's -- that's a position that  
12 is more up for discussion. It fits more into  
13 the Merrill Lynch category than it does into the  
14 pure-play category.

15 Q. And do you recall what -- what  
16 advice you gave to her?

17 A. I think, based upon our observance  
18 of the movements in and out of Brown Brothers  
19 Harriman, we determined that on reflection a  
20 significant portion of those were likely  
21 hedge-related shares.

22 Q. And what was that proportion; do you  
23 recall?

24 A. I'm sorry? Did you say what was  
25 that proportion?

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER

2 Q. Did you say "proportion" in your  
3 answer? I'm sorry.

4 A. Maybe you can read it back.

5 Q. I withdraw the question.

6 Do you recall any other times that  
7 Meredith Cole or Kim Masterson came to you --  
8 you said that there have been a few times --

9 A. Those are recent --

10 Q. Those are --

11 A. -- recollections.

12 They happened throughout the course  
13 of the year, and I don't -- I mean, this is a  
14 significant matter, but it's one of many matters  
15 we're involved in.

16 Q. Right.

17 A. So I don't have specific -- you  
18 know, if -- if there is a particular issue that  
19 would help refresh my recollection, I would be  
20 happy to -- to try to remember what that was,  
21 but ...

22 Q. Okay.

23 A. I would say largely I believe that  
24 our folks are pretty accurate in what they do.  
25 I don't always agree with their

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 characterizations, and I make changes if I  
 3 believe they're not quite exact. But I think  
 4 our people are quite professional and good at  
 5 what they do.  
 6 Q. You said that you reviewed these  
 7 approximately half of the time?  
 8 A. Somewhere. That's very approximate,  
 9 yes.  
 10 Q. Has there ever been an instance in  
 11 which a report went out and you thought, you  
 12 know, I don't quite agree with this  
 13 characterization?  
 14 A. Yeah, I would -- I would say  
 15 there -- that's occurred.  
 16 Q. And what do you recall about those  
 17 instances?  
 18 A. There was -- there was -- you know,  
 19 in the documents that we produced I think, I  
 20 think one of the earlier, I can't remember  
 21 exactly what it was, there was something I  
 22 didn't quite agree with. And I think I, as I  
 23 recall, I informed them that I didn't agree with  
 24 that characterization -- whatever it was I can't  
 25 recall -- and they changed it in a subsequent

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 report, after discussion.  
 3 Q. But you don't recall what it was.  
 4 A. I don't recall specifically. If I  
 5 looked at the documents we could probably find  
 6 that.  
 7 Q. And were there other instances of  
 8 this?  
 9 A. Not that I can recall.  
 10 Q. Okay. I'm going to switch topics.  
 11 A. Sure.  
 12 Q. Did Innisfree perform any analysis  
 13 of the movement of CSX shares during the time  
 14 period around the February 27, 2008, original  
 15 record date?  
 16 A. Yes.  
 17 Q. Who asked that this analysis be  
 18 done?  
 19 A. Who asked that the analysis be done?  
 20 I think the analysis was done -- more than one  
 21 analysis was done independently by our folks.  
 22 Certainly Meredith and Kim were looking at it  
 23 from their perspective in terms of their weekly  
 24 reporting. And Lloyd Lefcourt was looking at it  
 25 in terms of his assisting me in performing the

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 analyses of the shareholder base vis-a-vis the  
 3 prospective record date.  
 4 Q. So you were not asked by anyone at  
 5 CSX to perform this analysis?  
 6 A. No. This is work we would have been  
 7 doing in the -- in the ordinary course. Whether  
 8 or not somebody at CSX asked somebody at  
 9 Innisfree to do something we were already doing,  
 10 I couldn't -- I couldn't tell you.  
 11 Q. So this is an ongoing analysis that  
 12 wasn't for a -- your analysis wasn't to cover a  
 13 specific topic?  
 14 A. Well, clearly we were focused on the  
 15 record date.  
 16 Q. And how long before and after the  
 17 record date were you focussing on? What was the  
 18 time period?  
 19 A. We focused on movement within the  
 20 shareholder bases, as -- as I testified earlier,  
 21 on a weekly basis, but were not limited to that.  
 22 And, clearly, when a record date occurs, since  
 23 that's going to be the -- the snapshot, as it  
 24 were, as to who can vote with respect to the  
 25 meeting, we have a particular focus with regard

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 to that date.  
 3 Q. And what was the purpose of your  
 4 analysis?  
 5 A. What was the purpose of the  
 6 analysis? Which analysis are you referring to?  
 7 Q. Your ongoing analysis, but with  
 8 respect --  
 9 A. I think the ongoing analysis I've  
 10 previously testified was to inform the client as  
 11 to changes in their shareholder base that might  
 12 be of consequence.  
 13 The specific analysis with regard to  
 14 the record date, as I just testified, is to  
 15 understand who would be entitled to vote as of  
 16 that date.  
 17 Q. And if you could tell me again who  
 18 was involved in the analysis? I believe you  
 19 named a number of people who did this.  
 20 A. As I said, the independent analyses  
 21 performed revolving around the same subject  
 22 matter, Meredith Cole and Kim Masterson on the  
 23 one hand; Lloyd Lefcourt on the other.  
 24 Q. And did you and Lloyd Lefcourt  
 25 discuss your part of the analysis with Meredith

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 with which counterparties.  
 3 Q. And do these counterparties, to your  
 4 knowledge, do they hold positions for other  
 5 hedge funds?  
 6 A. Typically they would, yeah.  
 7 Q. Did you share your conclusion with  
 8 anyone at CSX?  
 9 A. Yes.  
 10 Q. Who?  
 11 A. Initially?  
 12 Q. Initially.  
 13 A. My initial call was with  
 14 Mr. Stephenson, and then I spoke shortly  
 15 thereafter to Ms. -- Mrs. Fitzsimmons.  
 16 Q. And what do you recall about your  
 17 call with Mr. Stephenson?  
 18 MS. GROSSBARD: I'm going to note --  
 19 just interrupt for a moment to note that I  
 20 know that you've been involved with  
 21 conversations with counsel for CSX, and any  
 22 conversations that you have been privy to  
 23 that involved legal advice being --  
 24 concerning CSX, as well as any -- any  
 25 matters relating to this litigation, any

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 work product you might have been involved  
 3 with the lawyers, you know, I'm going to  
 4 ask that you not testify concerning those  
 5 things, but cut them out.  
 6 At this point I'm not saying that  
 7 there necessarily is anything --  
 8 THE WITNESS: I'll keep that in  
 9 mind.  
 10 MS. GROSSBARD: -- but please keep  
 11 that in mind.  
 12 BY MS. SERRANZANA:  
 13 Q. What do you recall from your  
 14 conversation with Mr. Stephenson?  
 15 A. I advised both of them that the  
 16 movement in the shares was not only aberrant in  
 17 a way we had never seen before but likely made  
 18 the outcome of a proxy contest untenable,  
 19 insofar as the number of shares that had moved  
 20 away from positions held by long-term investors  
 21 whose support would be required in order to  
 22 attempt to prevail in such a fight.  
 23 Those shares had, in turn, moved  
 24 into positions held by hedge funds -- or held by  
 25 custodians for hedge funds and -- in terms of

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 direct ownership, and swaps, and I had a  
 3 significant concern that, based on my  
 4 experience, that the swap counterparties were  
 5 likely to vote the shares that they held in a  
 6 manner prescribed by the hedge funds, even  
 7 though theoretically that's prohibited.  
 8 Q. What was the basis of your statement  
 9 that the swap counterparties were likely to, I  
 10 guess, vote with the hedge funds?  
 11 A. My experience in numerous  
 12 transactions -- I think we're involved in more  
 13 hostile or unsolicited M&A transactions than  
 14 anyone else, certainly as many as -- as any  
 15 other party in our business. So my experience  
 16 in that over the past 30 years.  
 17 Q. Do you have any knowledge that  
 18 there's an arrangement between TCI and its swap  
 19 counterparties to act in that way?  
 20 A. I don't think there's any written  
 21 arrangement, if that's the question.  
 22 Q. Are you aware of any arrangement of  
 23 any kind?  
 24 A. I think I just testified that in my  
 25 experience, notwithstanding the prohibition

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
 2 against hedge funds directing the votes held by  
 3 counterparties in connection with swap  
 4 arrangements, that the counterparties frequently  
 5 vote in a manner specified by the hedge funds.  
 6 Q. But in this specific case do you  
 7 have any knowledge that that is what's happened?  
 8 A. That is my concern, that that's what  
 9 would occur.  
 10 Q. But do you have any knowledge that  
 11 that is what's happening in this case?  
 12 A. We -- we won't know until it does  
 13 happen, won't we? I mean, I'm just -- what I'm  
 14 testifying to is based on my experience, that  
 15 that frequently happens, and, therefore, I had a  
 16 concern that would happen again.  
 17 Q. That they would vote --  
 18 A. Vote shares for which they had no  
 19 economic exposure, in a manner specified by  
 20 their hedge fund clients, which was -- which in  
 21 my understanding is contrary to law.  
 22 Notwithstanding that, I've seen it occur many  
 23 times.  
 24 Q. And what was Mr. Stephenson's  
 25 response?

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER

2 A. He was clearly concerned, as -- as I

3 was, as Mrs. Fitzsimmons was, as everyone

4 related to the matter was.

5 Q. How did he express those concerns?

6 What exactly did he say to you?

7 A. I don't -- I don't have a specific

8 recollection of what he said other than, you

9 know, it's a serious matter.

10 Q. What exactly were his concerns?

11 A. I think his concerns were my

12 concerns, which -- which I just enumerated. I

13 believe that to be the case. He didn't

14 articulate them in that manner.

15 MS. SERRANZANA: I've been informed

16 that we have five minutes of tape, so if we

17 could break.

18 THE VIDEO OPERATOR: This marks the

19 end of Tape Number 1. Going off the

20 record. The time is 11:44 a.m.

21 ---

22 (Recess.)

23 ---

24 THE VIDEO OPERATOR: Returning to

25 the record. The time is 11:51 a.m. This

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER

2 marks the beginning of Tape Number 2.

3 BY MS. SERRANZANA:

4 Q. Mr. Miller, earlier you stated you

5 "looked at the evidence and concluded that the

6 movement among the custodians was something we

7 had never quite seen in that magnitude or in the

8 concentration into the -- into positions held by

9 hedge funds, TCI and 3G among them, held by them

10 or held by their swaps counterparties. Just to

11 be clear. And other hedge funds, but largely

12 into positions that appeared to be related to

13 them, and away from long-term investors index

14 funds, primarily around the time of their record

15 date."

16 Can you elaborate on that?

17 A. Can I elaborate on the fact that I

18 had not seen this degree of movement into

19 positions like that previously? I mean --

20 Q. Yes. Please.

21 A. In my experience of reviewing

22 shareholder bases in connection with record

23 dates or meetings of shareholders, the movement

24 that we saw was -- was quite extreme, I thought.

25 Q. And what was the magnitude of this

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER

2 movement; do you recall?

3 A. I don't recall the exact number of

4 shares, the exact percentages. It was quite

5 large.

6 Q. Were these movements reflected in

7 the snapshots that you distributed?

8 A. I believe so. You know, I can't --

9 I would have to take a look at the -- any

10 specific snapshot to see if it's something that

11 did accurately reflect my view at the time.

12 Q. Why wouldn't it be reflected in the

13 snapshot?

14 MR. BOWIE: Object to the form.

15 A. I don't know that it wasn't.

16 MR. BOWIE: Excuse me. Go ahead.

17 A. I just simply said that I would like

18 to take a look at any particular snapshot to see

19 if that corresponded to my view.

20 BY MS. SERRANZANA:

21 Q. You also stated that shares were

22 moving away from long-term investor index funds?

23 That was happening concurrently with the

24 movement into the hedge fund?

25 A. That's correct. Around that record

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER

2 date.

3 Q. And this was something you had never

4 seen before.

5 A. Not in that magnitude.

6 There was also an issue of the

7 dividend record date being close to or -- or

8 synonymous. So there would have been some

9 movement in connection with dividend role

10 activity. But the movement that we saw exceeded

11 what we would have expected would have been

12 related to that type of activity.

13 Q. Can you explain a little bit more

14 about what kind of movement you expect to see

15 around a dividend date?

16 A. There -- and I don't focus on -- on

17 the -- that sort of activity typically. But --

18 so I'm not going to claim to be an expert in

19 what occurs in a dividend role. But my

20 understanding is that offshore investors can

21 gain tax benefits by engaging in -- in these

22 transactions.

23 Q. Resulting in what?

24 A. Resulting in their not being deemed

25 to be in receipt of dividends, and other

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5/5/2008 Miller, Alan

1       HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
2       for any rational explanation as to what's going  
3       on. So I don't recall a specific conversation.  
4       There were certainly many conversations among us  
5       relating to what we were seeing.  
6       Q.     Who did you speak with?  
7       A.     I think I testified earlier I spoke  
8       to Mr. Lefcourt, I spoke to Ms. Shotwell, I  
9       spoke to Mr. Winter, I spoke to Ms. Cole, I  
10      spoke to Ms. Masterson.  
11      Q.     I mean at CSX. I'm sorry.  
12      A.     Oh, at CSX?  
13      Q.     Yes.  
14      A.     I think I testified earlier I spoke  
15      to Ms. Fitzsimmons. But not -- obviously, not  
16      in terms of how you make sausage, but what our  
17      conclusions were.  
18      Q.     Anyone else?  
19      A.     On this particular subject matter?  
20      MR. BOWIE: You mean at any time,  
21      later on?  
22      Q.     At any time later on, yes.  
23      A.     Yeah, it may have come up during the  
24      regular calls among the parties that are  
25      assisting CSX in this matter.

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5/5/2008 Miller, Alan

1       HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
2       Q.     Are these Blue Ridge calls?  
3       A.     I think -- yes, you're referring to  
4       the calls among the working group that are --  
5       and under the rubric of the Blue Ridge team.  
6       Q.     Do you recall what was discussed  
7       about this issue with the Blue Ridge team during  
8       these calls?  
9       A.     The -- you know, the only mention of  
10      it would have been our -- our conclusion with  
11      respect to what was occurring, and its  
12      implications. In other words, no one  
13      second-guessed our analysis.  
14      Q.     Were you ever asked at any time to  
15      explore whether there were other possible  
16      explanations for the movement of shares?  
17      A.     May have been. You know, in  
18      speaking to -- to counsel that may have come up,  
19      yeah.  
20      Q.     And what was the substance of that  
21      conversation?  
22      A.     You know, again, I don't have a --  
23      MS. GROSSBARD: I don't want you to  
24      get into conversations with counsel.  
25      A.     Yeah, I think we're going -- going

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5/5/2008 Miller, Alan

1       HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
2       into an area that relates to strategy, so I'm  
3       going to politely decline to answer that.  
4       Q.     Did you -- did you do that analysis,  
5       that study of whether there was another  
6       explanation? Did you look into it?  
7       A.     Did I do an analysis? I did not.  
8       Q.     Did Innisfree?  
9       A.     Innisfree did, I think, a number of  
10      analyses that I was not directly involved in.  
11      Q.     Do you know who would know about  
12      those analyses?  
13      A.     Mr. Crozier, my partner. Arthur  
14      Crozier. My co-chairman.  
15      Q.     Anyone else?  
16      A.     I don't know specifically. I assume  
17      Ms. Cole and Ms. Masterson, and potentially  
18      Mr. Lefcourt were involved, but I was not  
19      directly involved in those.  
20      Q.     Do you believe there are other  
21      possible explanations?  
22      A.     Do I believe there are other  
23      possible explanations beyond movement in  
24      connection with obtaining votes vis-a-vis the  
25      record date and/or dividend role?

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5/5/2008 Miller, Alan

1       HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
2       Q.     Yes.  
3       A.     Anything is possible. I'm just not  
4       aware of what they might be. In my experience,  
5       which is fairly extensive in these matters, I --  
6       I don't recall encountering another explanation  
7       for this type of movement.  
8       Q.     You mentioned a while back that in  
9       your experience -- and, you know, definitely let  
10      me know if this is an incorrect  
11      characterization -- that you had come across  
12      instances where hedge funds had influenced the  
13      vote of a swap counterparty.  
14      A.     Yes.  
15      Q.     Can you name some of those  
16      instances, who it involved, when you saw this  
17      take place? Your experience with it.  
18      A.     Can I name some of -- it happens  
19      frequently.  
20      Q.     Can you enumerate some of those  
21      times?  
22      A.     One classic example is  
23      Hewlett-Packard.  
24      Q.     And what happened in that case?  
25      A.     In that case five of six

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER

2 A. Morgan Stanley, Evercore, Cravath,  
3 and I believe Weil, Gotshal as well.

4 Q. Did Nathan Goldman ask you to  
5 present at the meeting in addition to -- I  
6 believe you might have said this, but if you  
7 could refresh my memory? Did he ask you to make  
8 a presentation?

9 A. I was asked to inform -- and I can't  
10 tell you in exactly which conversation or  
11 whether it was only with Nathan or with others,  
12 but I was expected to give my perspective on the  
13 current situation, which I did.

14 Q. And tell me again, what topics did  
15 you end up presenting?

16 A. I focused solely on the topic we've  
17 been discussing here at some length, which was,  
18 you know, on the basis of what I viewed as the  
19 aberrant movement of shares into hedge  
20 positions, some of which likely controlled,  
21 directly or indirectly, by TCI and 3G, and away  
22 from long-term investors on or about the record  
23 date, that the prospects for success were  
24 becoming untenable.

25 Q. How long did you present for?

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER

2 A. Very briefly.

3 Q. Approximately how long?

4 A. Two minutes. I had previously -- on  
5 previous occasions I had taken the board through  
6 the makeup of the shareholder base and tried to  
7 explain our view of how things worked.

8 Q. So you presented your concerns for  
9 approximately two minutes --

10 A. Very briefly, yeah.

11 Q. And during that presentation did you  
12 hand out any documents?

13 A. I did not.

14 Q. Did you have a PowerPoint  
15 presentation --

16 A. I did not.

17 Q. -- or anything of that nature?

18 A. No.

19 Q. Okay. During the course of your  
20 presentation did you discuss the possibility  
21 that the movement of shares was in some way  
22 connected to TCI? I think you testified that  
23 you had.

24 A. Yes. I believe that's what -- did I  
25 say that in the board meeting? I don't have an

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER

2 exact recollection. I certainly said, as I've  
3 just testified, that the aberrant -- what we  
4 viewed as the aberrant movement of shares was  
5 problematic.

6 Q. Problematic because?

7 A. Because of its implications on the  
8 prospective solicitation of shareholders.  
9 Some -- some of whom, you know, would not have  
10 their voting rights as of the record date.

11 Q. And did you present your thoughts --  
12 would you say that they were presented as  
13 your -- as a reasonable guess as to the -- as to  
14 why the shares moved the way that they did, or  
15 as a likely possibility? Or something else?

16 A. What I was discussing was the  
17 composition --

18 MS. GROSSBARD: Objection.

19 A. -- of the shareholder base as of the  
20 record date and its implications for the outcome  
21 of the proxy contest.

22 Q. Did you discuss any -- did you  
23 discuss why you thought that the shares were  
24 moving in the way that they were?

25 A. What I -- I think I previously

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER

2 testified, that what I discussed was the -- what  
3 we regarded as the aberrant movement of shares  
4 into custodians that hold for hedge funds, and  
5 for swap arrangements with hedge funds, and away  
6 from longer-term -- custodians that hold for  
7 longer-term investors, including index funds.

8 Q. So after your presentation did  
9 anyone ask any questions?

10 A. I don't recall.

11 Q. Was there any discussion?

12 A. Not extensive discussion, no.

13 Q. Who did you discuss this with after  
14 your presentation?

15 A. Who did I discuss ...

16 Q. Your presentation. You said there  
17 weren't extensive presentations.

18 A. I thought you were referring to  
19 discussions within the board room.

20 Q. Okay. Tell me about the discussions  
21 within the board room.

22 A. I don't recall any specific  
23 discussions within the board room after my  
24 presentation.

25 Q. Okay.

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER

2 A. I think we were quickly on to the  
3 next topic, but I don't have an exact -- I  
4 couldn't swear to you that nobody asked a  
5 question. I just don't have a specific  
6 recollection of that.

7 Q. Okay. So at any time during the  
8 meeting or after did anyone question your  
9 analysis?

10 A. No.

11 Q. Did anyone question the explanation  
12 given for the movement of shares?

13 A. Which explanation?

14 Q. I'm sorry. I withdraw the question.

15 During the meeting did you suggest  
16 that the record date and the meeting date be  
17 moved?

18 A. Yes.

19 Q. Tell me about what you said.

20 A. Or at least I believe I did. I'm  
21 trying to recollect exactly. I may have not  
22 discussed it. It may have been that the company  
23 discussed that it was my recommendation that we  
24 do that.

25 Q. And what exactly did they say? Or

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5/5/2008 Miller, Alan

1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER

2 to your best recollection what did they say?

3 A. My best recollection was -- we may  
4 be getting into an area that also I should not  
5 answer.

6 Q. Would you like to take a moment to  
7 speak with counsel about whether you can talk  
8 about it?

9 A. Yes. That would be helpful.

10 MR. BOWIE: Watch your microphone.

11 THE VIDEO OPERATOR: Going off the  
12 record. The time is 12:24 p.m.

13 ---

14 (Recess.)

15 ---

16 THE VIDEO OPERATOR: Returning to  
17 the record. The time is 12:30 p.m.

18 MS. SERRANZANA: Would you please  
19 read the question back.

20 (The reporter read back as follows:

21 "QUESTION: And what exactly did  
22 they say, or to your best recollection what  
23 did they say?")

24 MS. GROSSBARD: And I'm just going  
25 to note, based on discussions, that to the

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2 extent, Mr. Miller, that you can testify  
3 what your suggestions and your proposals  
4 were, but to the extent that you can't  
5 then, as far as other conversations you  
6 were privy to, separate out what  
7 conversations about prospective potential  
8 litigation, that you not discuss those  
9 conversations.

10 THE WITNESS: Okay.

11 MR. BOWIE: With that instruction,  
12 are you able to answer the question?

13 THE WITNESS: Could you repeat the  
14 question again, the full question?

15 (The reporter read back as follows:

16 "QUESTION: Did anyone question the  
17 explanation given for the movement of  
18 shares?")

19 MR. BOWIE: That one's already been  
20 answered. I think you need to go a little  
21 bit further.

22 (The reporter read back as follows:

23 "QUESTION: Tell me about what you  
24 said.

25 "ANSWER: Or at least I believe I

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2 did. I'm trying to recollect exactly. I  
3 may not have discussed it. It may have  
4 been that the company discussed that it was  
5 my recommendation that we do that.

6 "QUESTION: And what exactly did  
7 they say? Or to your best recollection  
8 what did they say?

9 "ANSWER: My best recollection  
10 was -- we may be getting into an area that  
11 also I should not answer.")

12 A. I think it would be difficult for me  
13 to answer that, what they said, without getting  
14 into litigation strategy and other strategy,  
15 that may -- may have some privilege attached to  
16 it.

17 Q. Could you tell me what the general  
18 reaction was to your suggestion that the meeting  
19 date -- that the record -- well, let's get this  
20 straight first.

21 Were you suggesting that both the  
22 record date and the meeting date be moved?

23 A. Yes.

24 Q. Can you tell me what your -- what  
25 the general reaction was to your suggestion?

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2 A. There was at some point a motion to

3 move the record and meeting dates, and it was

4 approved by the board.

5 Q. Was there any discussion prior to

6 that motion being made?

7 MS. GROSSBARD: I think that's a

8 yes-or-no question, from my perspective.

9 A. Yes.

10 Q. Can you tell me about those

11 discussions without --

12 A. No.

13 Q. -- violating privilege?

14 Why did you make the -- the

15 suggestion to move the record date and meeting

16 date?

17 A. Why did I make the suggestion to

18 move the record date and meeting date?

19 Q. Yes.

20 A. I made the suggestion to move the

21 record date and meeting date with the

22 expectation that it was possible, though not

23 certain, that by doing so the -- the aberrant

24 movement we witnessed as of the initial record

25 date might not repeat.

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2 Q. Any other reasons?

3 A. I think that was the primary reason.

4 Q. So a motion was made to move the

5 record date and meeting date. And did that

6 motion pass?

7 A. Yes.

8 Q. Would it be fair to say that your

9 presentation regarding the movement of shares

10 around the February 27, '08, record date was a

11 factor that contributed to moving the meeting

12 date and record date?

13 A. I believe --

14 MS. GROSSBARD: I'm going to object

15 to that, because I think that you're

16 cutting out a whole interim bunch of stuff

17 and making an assumption that I don't think

18 is a fair characterization.

19 If he can answer the question, he

20 can answer.

21 A. I would assume it was a factor and

22 not the only factor.

23 Q. You've mentioned a few times that

24 one of the things you saw prior to the record

25 date was the movement of shares away from the

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2 index funds into the hedge funds?

3 A. Correct.

4 Q. Can you elaborate on that, as in

5 what did these transactions consist of? Was it

6 a sale of shares? What kind of movement are we

7 seeing?

8 A. It's -- let me say this: It's not

9 possible, when viewing movement, to characterize

10 a particular movement as a sale or a loan, but

11 what is clear is that the lending activity in

12 the days preceding the February record date

13 significantly exceeded the trading volume.

14 The movement -- again, the movement

15 of shares among custodians significantly

16 exceeded the trading volume, so that one could

17 conclude there was a lot of lending activity

18 going on.

19 MS. SERRANZANA: I think this would

20 be a good time to break for lunch.

21 MR. BOWIE: Sure.

22 THE VIDEO OPERATOR: Going off the

23 record. The time is 12:36 p.m.

24 (Lunch recess taken at 12:36 p.m.)

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2 A F T E R N O O N S E S S I O N

3 (1:19 p.m.)

4 THE VIDEO OPERATOR: Returning to

5 the record. The time is 1:19 p.m.

6 -- --

7

8 A L A N M I L L E R,

9 resumed as a witness, having been

10 previously sworn by the Notary Public,

11 was examined and testified further as

12 follows:

13 EXAMINATION

14 BY MS. SERRANZANA:

15 Q. Good afternoon, Mr. Miller.

16 A. How are you?

17 Q. I'm fine.

18 In your last answer you stated,

19 "It's not possible when viewing movement to

20 characterize a particular movement as a sale or

21 a loan, but what is clear is that the lending

22 activities in the days preceding the February

23 record date significantly exceeded the trading

24 volume."

25 Do you recall that?

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2 CSX -- in CSX stock at that point.  
3 Q. Was this something that hadn't been  
4 seen prior to this time?  
5 A. That I couldn't say. This was at or  
6 about the time we began working for CSX.  
7 I think what she is saying is that  
8 it is aberrant -- aberrant, as it were -- for  
9 these types of entities to be filing for such  
10 large positions in a company like CSX.  
11 Q. This was something you didn't  
12 normally see in your regular course of business,  
13 correct?  
14 A. We see positions like this from time  
15 to time, and they're indicative of hedge fund  
16 ownership and/or swap. In this case, with these  
17 counterparties filing, it's indicative, more  
18 frequently, of swap contracts.  
19 Q. In the next bullet point she says:  
20 "Swap accounts have a mixed record regarding  
21 their participation in proxy voting - although  
22 ownership can be changed to the hedge fund prior  
23 to the meeting date."  
24 Do you see that?  
25 A. I do.

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2 Q. What was the basis of knowledge for  
3 swap accounts having a mixed record regarding  
4 their participating -- participation in proxy  
5 voting?  
6 MS. GROSSBARD: Objection.  
7 A. This -- let me take this a step  
8 back.  
9 This clearly is directed to myself  
10 and my partner, Ms. Shotwell. It's clearly a  
11 draft of a document that she was contemplating  
12 sending to the client. And, you know, these  
13 points were apparently composed for our review.  
14 What Kim's basis for saying that was I don't  
15 know, but I will tell you that that is a true  
16 statement --  
17 Q. What is meant by --  
18 A. -- based on my experience.  
19 So this may be a result of  
20 conversations with me or others at Innisfree who  
21 have had similar experience in dealing with  
22 hedge funds, swap counterparties, in the context  
23 of activist hedge fund situations.  
24 Q. I'm not sure I see where it says  
25 "draft." Is that something you remember, or is

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1 HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY-ALAN MILLER  
2 that on here and I'm not seeing it?  
3 A. No, no. There would be no reason  
4 for her to direct this type of a report to me if  
5 it were not for the purpose of -- she could  
6 easily pick up the phone and say, Here's what I  
7 see.  
8 Q. Right. And what does "mixed record"  
9 mean, to your understanding?  
10 A. What is my understanding of what Kim  
11 was trying to say here?  
12 Q. Yes.  
13 A. I think what she was trying to say  
14 here was sometimes the counterparties vote the  
15 shares and sometimes they don't.  
16 Q. If you could look at the next page,  
17 the chart. And if you would look at swap  
18 accounts, the box at the bottom?  
19 (Witness reviewing document.)  
20 Q. Is this Innisfree's understanding of  
21 how swap accounts operate?  
22 A. I would have to read the whole  
23 thing, but I would say this is -- this is  
24 clearly a draft of a description that Kim was  
25 considering presenting to the client.

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2 (Witness reviewing document.)  
3 These are -- are Kim's words. I  
4 would say, in reading this, I don't find  
5 anything grossly inaccurate about it. It may  
6 not be my words, but it seems to be a fair -- a  
7 fair summary of what's going on.  
8 Q. Could you explain to me what your  
9 understanding is of a swap?  
10 A. A swap is an arrangement whereby  
11 a -- an investor puts up a small amount of  
12 money, 10 percent, 20 percent of the value of  
13 the equity. The counterparty bank purchases the  
14 securities. The counterparty bank charges the  
15 investor a lending rate. The investor is  
16 responsible for the downside. The counterparty  
17 bank is responsible for paying the upside to the  
18 investor. And typically these days the  
19 contracts are settled in cash.  
20 Q. Well, per your -- per  
21 Ms. Masterson's analysis on this sheet, would it  
22 be correct in stating that the banks are the  
23 owners of the shares and have the full voting  
24 rights?  
25 A. That the banks are the owners of the

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2 company with this high percentage of hedge  
3 ownership had 'survived' activism with such  
4 levels."  
5 What do you think was meant by  
6 "survived"?  
7 MS. GROSSBARD: Objection.  
8 A. I don't know. It's Kim's  
9 characterization. I think what she's saying  
10 here is that in many of these situations some  
11 change demanded by the hedge fund activists had  
12 occurred in most of these circumstances.  
13 Q. That sentence also references a  
14 previous discussion during which the issues in  
15 this e-mail had been discussed.  
16 Do you recall that discussion?  
17 A. Not at all.  
18 MS. SERRANZANA: I've just been  
19 informed that we need to change the tape,  
20 so if we could take a break.  
21 THE WITNESS: Sure.  
22 MS. SERRANZANA: Go off the record.  
23 THE VIDEO OPERATOR: This marks the  
24 end of Tape Number 2. We're going off the  
25 record. The time is 1:53 p.m.

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2 ---  
3 (Recess.)  
4 ---  
5 THE VIDEO OPERATOR: Returning to  
6 the record. The time is 2:04 p.m. This  
7 marks the beginning of Tape Number 3.  
8 A. Okay. Just to clarify an answer I  
9 gave earlier, you asked me how many times I  
10 participated in these panels on hedge fund  
11 activism?  
12 Q. Yes.  
13 A. As I thought about it, it's probably  
14 more like, you know, ten or twelve times in the  
15 last year rather than three or four, including  
16 the one with Mr. Weingarten a couple of weeks  
17 ago. So ...  
18 Q. Thank you for the clarification.  
19 A. Certainly.  
20 Q. To your knowledge, was there any  
21 analysis -- any action taken on CSX's part in  
22 reaction to this e-mail or the report attached?  
23 A. I can't imagine. What do you mean  
24 by "action taken"?  
25 Q. Did they decide to -- withdrawn.

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2 A. I'm sorry?  
3 Q. I'm withdrawing the question.  
4 A. Okay. Sure.  
5 ---  
6 (Miller Exhibit 9 was marked for  
7 identification.)  
8 ---  
9 MR. BOWIE: Are we on Exhibit 9?  
10 THE COURT REPORTER: Yes, sir.  
11 MR. BOWIE: Great.  
12 BY MS. SERRANZANA:  
13 Q. I've just handed you Miller Exhibit  
14 9. Do you recognize this e-mail?  
15 A. Yeah.  
16 Q. What is this e-mail chain?  
17 A. It's an e-mail, let's see, beginning  
18 with a question from Nathan Goldman at CSX,  
19 addressed to me and Kim, copying outside  
20 counsel.  
21 Q. Do you see in your response, I  
22 believe it's the second e-mail from the bottom,  
23 you state: "Shares held in swap positions where  
24 Deutsche serves as counterparty are frequently  
25 not voted in controversial situations?"

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2 Do you see that sentence?  
3 A. Right. Although -- but the complete  
4 sentence is: "Although they may be subject to  
5 influence by the prop desk or, in some cases, by  
6 their hedge fund clients," which is what we're  
7 talking about here.  
8 Q. What is the basis for the beginning  
9 of that phrase?  
10 A. I'm sorry?  
11 Q. What is -- what is the basis for --  
12 for your statement there?  
13 A. The basis for the statement is that  
14 in our experience sometimes the counterparties  
15 will vote the shares as directed by the hedge  
16 funds. Sometimes they will not. And we  
17 speculate that sometimes the prop desk may have  
18 influence on the voting decision.  
19 As I indicated in my testimony  
20 earlier, in the ClearChannel situation, which  
21 was certainly extraordinarily controversial,  
22 Deutsche Bank had lent out all of its shares  
23 and, therefore, could not vote the shares  
24 pursuant to the wishes of their hedge fund  
25 clients, even if they wanted to.

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